

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1934

No. 6223

550

WILLIAM FIELD, APPELLANT,

vs.

GEORGE H. CARTER, THE PUBLIC PRINTER.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED MAY 4, 1934.

PRINTED JUNE 12, 1934.

Court of Appeals of the District of Columbia

APRIL TERM, 1934.

No. 6223

WILLIAM FIELD, APPELLANT,

vs.

GEORGE H. CARTER, THE PUBLIC PRINTER,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 6, 1934.

Court of Appeals of the District of Columbia

No. 6223.

WILLIAM FIELD, Appellant,

vs.

GEORGE H. CARTER, The Public Printer.

a Supreme Court of the District of Columbia.

At Law.

No. 83381.

WILLIAM FIELD, Plaintiff,

vs.

GEORGE H. CARTER, The Public Printer, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Mandamus.*

Filed November 7, 1933.

In the Supreme Court of the District of Columbia, Holding
a Law Court.

Law. No. 83381.

WILLIAM FIELD, Plaintiff,

vs.

GEORGE H. CARTER, The Public Printer, Defendant.

To the Honorable the Judges of the Supreme Court of the
District of Columbia:

Comes now petitioner, by his attorneys, William E. Leahy and William J. Hughes, Jr., and prays herewith for the issuance of a writ of mandamus against defendant George H. Carter, The Public Printer, and for cause shows:

1. Petitioner is a citizen of the United States, a resident of the District of Columbia, over twenty-one years of age, and is a member of the Columbia Typographical Union, Washington, D. C. Petitioner brings this suit in his own right and on behalf of all others similarly situated, in particular, members of the Columbia Typographical Union.

2. Defendant George H. Carter is a citizen of the United States, a resident of the District of Columbia, and The Public Printer of the United States, and is sued in his capacity as The Public Printer.

3. Petitioner is now and has been for several years last past a proof-reader in the employ of the Government Printing Office and under the immediate direction and supervision of the defendant. Petitioner entered the employ of the Government Printing Office on January 7, 1930,
2 having received a probationary appointment as proof-reader at \$1.10 per hour. Petitioner received his permanent appointment of proof-reader on July 7, 1930.

4. Petitioner avers that under the Act of Congress approved June 11, 1896, as amended (44 USCA, Sec. 45) petitioner is entitled to thirty days' leave of absence with pay

during any one fiscal year. Petitioner avers he obtained, upon application, his thirty days' leave of absence with pay for the fiscal year 1930 and that having faithfully performed his duties in his employment aforesaid during the fiscal year 1931 he was entitled to thirty days leave with pay which was earned by him during the said fiscal year 1931. Petitioner avers that of the said thirty days leave of absence with pay earned by petitioner during the fiscal year 1931, petitioner has already received fourteen and one-quarter days' leave of absence with pay and that there was due him fourteen and one-quarter days' leave of absence with pay earned by petitioner during the fiscal year 1931.

5. Petitioner avers that on September 11, 1933 he made application for the said fourteen and one-quarter days' leave of absence with pay.

6. Petitioner avers that by a letter dated September 13, 1933, which is attached hereto and made a part hereof as Exhibit 1, the defendant herein denied your petitioner's application for the said fourteen and one-quarter days' of unused leave of absence with pay on the sole ground that Sec. 215 of the Economy Act, approved June 30, 1932, as amended by the Act approved March 20, 1933, limited to fifteen days the right of employees of the Government Printing Office to leave with pay in any one year and that Sec. 103 of the said Economy Act suspended the granting of any leave with pay whatsoever in the fiscal year 1933.

3 7. Petitioner avers that at the time of the approval of the Economy Act, namely June 30, 1932, your petitioner had earned and there was due and owing to him fourteen and one-quarter days leave of absence with pay, which said fourteen and one-quarter days leave of absence with pay had been earned by your petitioner during the fiscal year 1931, namely, during the period of time from July 1, 1931 to June 30, 1932; that under the statutes and regulations made pursuant thereto your petitioner's service year in the said employment corresponds with the fiscal year as in the case of all employees of the Government Printing Office; that there was and is no justification for the defendant to deny the application of your petitioner for his said leave of absence with pay; that his right to the said leave of absence was at all times a vested and con-

tractual right in your petitioner pursuant to the Act of June 11, 1896, as amended, (44 U. S. C. A. Sec. 45) aforesaid, which said Act of Congress was in full force and effect during the period of time in which your petitioner earned his right to said leave of absence with pay, namely, during the fiscal year 1931; that your petitioner is now and has always been within the scope of the said Act of Congress; that the provisions of the said Act of Congress giving your petitioner the right to thirty days leave with pay for one year was and became an integral part of the terms of the relationship of employer and employee existing between the Government Printing Office and your petitioner; that the right to said leave of absence with pay so conferred by statute was and is a valuable right and a species of property pertaining to petitioner by reason of petitioner working in the Government Printing Office in the employment aforesaid.

8. Petitioner avers that his right to leave aforesaid
4 under the statute aforesaid, which became, as hereinbefore set forth, a vested right and an integral part, term and condition of his place of employment in the said Government Printing Office, was a valuable property right to him which could not be destroyed or taken from him without due process of law after petitioner had by his labor in his said employment earned the said leave of absence; that the denial of petitioner's right to leave of absence with pay after he had earned the said leave of absence with pay, by a statute retroactive in its nature, namely, the Economy Act of June 30, 1932, constitutes as to your petitioner the deprivation and taking of his property without due process of law and that, therefore, the provisions of the Economy Act, as amended, attempting to deprive your petitioner retroactively of his right to leave of absence with pay earned and accrued prior to the passage of the said Economy Act, renders the said Economy Act as to your petitioner and others similarly situated unconstitutional, and null and void, as depriving petitioner of a property right without due process of law and denying your petitioner the equal protection of the laws in violation of the Fifth Amendment of the Constitution of the United States, and the said provisions of the said Economy Act, as amended, are so discriminatory, unfair and unjust as to be of no legal effect whatsoever.

Wherefore, your petitioner prays:

1. That this court issue its rule to show cause to defendant requiring him to show cause why a writ of mandamus shall not issue against him commanding summarily to grant the application of your petitioner for fourteen and one-quarter days' leave of absence with pay as hereinbefore set forth;

2. That this court issue its writ of mandamus thus summarily commanding the defendant to grant to petitioner leave of absence with pay for fourteen and one-quarter days, for which he has made application as hereinbefore set out.

3. And for such other and further relief as the court may deem just and proper.

WILLIAM FIELD,
Petitioner.

WM. E. LEAHY,
WM. J. HUGHES, JR.,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, ss:

William Field, being first duly sworn on oath says that he has read the foregoing petition by him subscribed and knows the contents thereof and that he verily believes the facts therein stated to be true.

WILLIAM FIELD.

Subscribed and sworn to before me this 28th day of September, 1933.

[SEAL.]

N. M. L. JENKINS,
Notary Public, D. C.

"EXHIBIT 1."

JKW/AL. GHC.

United States Government Printing Office, Washington,
D. C.

Office of The Public Printer.

September 13, 1933.

SIR:

Receipt is acknowledged of your letter of September 11, 1933, making application for 14 $\frac{1}{4}$ days of unused leave of

absence with pay earned by you in the fiscal year ended June 30, 1932.

Section 215 of Economy Act approved June 30, 1932, limited to 15 days the leave with pay to Government employees in any one year, but Section 103 (*supra*) suspended the granting of any leave whatsoever in fiscal year 1933. Section 4 of the Act approved March 20, 1933, repealed above Section 103, effective April 1, 1933.

In this connection I invite your attention to the decision of the Comptroller General to the Public Printer (A-48206—A-48311) April 21, 1933, in which he states—

* * * the maximum amount of leave with which the leave account of any employee of the Government Printing Office may now be credited is not to exceed 15 days of the unused leave which had been earned during the fiscal year 1932 plus $1\frac{1}{4}$ days per month for each month's service after March 31, 1933. * * *

The records of this office show you earned $28\frac{1}{2}$ days' leave in fiscal year 1932, as provided for in Section 23 of the Act of January 12, 1895, as amended to March 2, 1895, but according to the Comptroller General's decision above cited, you were credited with not to exceed 15 days. Therefore, as $14\frac{1}{4}$ days of such leave have been granted to you since April 1, 1933, the Public Printer cannot grant your request for $14\frac{1}{4}$ days' additional leave earned in the fiscal year 1932.

Respectfully,
(Signed)

GEORGE H. CARTER,
Public Printer.

Mr. William Field, Proof Section, Government Printing Office, Washington, D. C.

Rule to Show Cause.

Filed November 7, 1933.

* * * * *

To George H. Carter, Public Printer, Washington, D. C.:

Upon consideration of the petition of William Field herein filed, you are hereby commanded to show cause on or before the 17th day of November, 1933, why the prayers

of the said petitioner should not be granted, provided that a copy of this rule and the petition filed herein be served on defendant herein not later than the 10 day of Nov. 1933.

F. D. LETTS,

Justice.

7

Marshal's Return.

Served a copy of the above rule on the above named George H. Carter, Public Printer, personally 11/8/33.

EDGAR C. SNYDER,

U. S. Marshal in and for the Dist. of Columbia,

By JAS. McCARTHY,

Deputy U. S. Marshal.

K.

Answer to Petition and Return to Rule.

Filed December 19, 1933.

* * * * *

Now comes the defendant, George H. Carter, Public Printer, now and at all times saving and reserving unto himself all exceptions to the many imperfections, uncertainties and defects in the petition for the writ of mandamus filed herein, and reserving unto himself all benefits of the lack of jurisdiction of the court appearing on the face of said petition to grant the relief prayed, and the lack of jurisdiction of the court to direct him to perform the acts in question, and relying upon the same as if demurrer had been specifically interposed, for answer to said petition and return to the rule to show cause, or so much thereof as is material for him to answer, answering says:

1. Answering paragraph one of said petition, this defendant admits that the petitioner is a citizen of the United States, a resident of the District of Columbia, and over twenty-one years of age.

As to the remaining averments of said paragraph, this defendant says that he has no knowledge or information thereof sufficient to form a belief.

2. This defendant admits the averments of paragraph two of said petition.

3. This defendant admits the averments of paragraph three of said petition, except that the dates of January 7, 1930, and July 7, 1930, appearing therein, should be January 8, 1930, and July 8, 1930, respectively.

4. Answering paragraph four of said petition, this defendant denies that under 44 U. S. C., Sec. 45, petitioner is entitled to thirty days' leave of absence with pay during any one fiscal year.

Further answering said paragraph, this defendant admits that thirty days' leave of absence with pay which accrued to the said petitioner during the fiscal year 1931 (July 1, 1930, to June 30, 1931), were granted to petitioner during the fiscal year 1932 (July 1, 1931, to June 30, 1932).

Further answering said paragraph, this defendant denies that petitioner was entitled to be granted thirty days' leave with pay in the fiscal year 1933 (July 1, 1932, to June 30, 1933), or that petitioner earned (except as that term is hereinafter defined), leave during the fiscal year 1932, or during any other fiscal year; but defendant avers that 28½ days' leave with pay accrued to petitioner during the said fiscal year 1932.

Further answering said paragraph, this defendant admits that petitioner was granted and received, during the fiscal year 1933, 14¼ days of the leave of absence with pay which accrued to him during the fiscal year 1932.

This defendant denies all the other averments of said paragraph.

5. Answering paragraph five of said petition, this defendant admits that on September 11, 1933, petitioner made application for 14¼ days' leave of absence with pay, claimed to have accrued during the fiscal year 1932.

6. Answering paragraph six of said petition, this defendant admits the averments thereof, except that he denies that petitioner was denied the leave applied for on the sole ground alleged therein.

7. Answering paragraph seven of said petition, this defendant denies that at the time of the approval of the Economy Act of June 30, 1932, the petitioner had earned (except as that term is hereinafter defined), and there was due and owing to him 14¼ days' leave of absence with pay, and further denies that said leave was earned (except as that term is hereinafter defined), by said petitioner dur-

ing the fiscal year covering the period from July 1, 1931, to June 30, 1932; and avers the fact to be that during the fiscal year 1932 there had accrued to the petitioner 28½ days' leave of absence with pay.

Further answering said paragraph, this defendant admits that, under the statutes and regulations made pursuant thereto, the said petitioner's service year in the said employment corresponded with the fiscal year as in the case of all employees of the Government Printing Office.

Further answering said paragraph, this defendant says that he is advised and believes that the remaining averments of said paragraph constitute conclusions of law which he is not required to answer.

8. This defendant is advised and believes that the averments of paragraph eight constitute conclusions of law which he is not required to answer.

Further answering said petition, this defendant avers that he is sued in his official capacity only, and has no personal interest in the subject matter of this suit; that this suit is, in effect, one against the United States of America, which has not been sued, and has not consented to be sued herein; and that this Honorable Court has no jurisdiction of this suit either against this defendant, or against
10 the United States of America, by reason of the provisions of Section 111 of the so-called Economy Act of June 30, 1932, and of the provisions of Section 9 of the Act of March 20, 1933 (5 U. S. C., p. 54, 1933, cumulative annual pocket part), amending the Act of June 30, 1932 (p. 47, supra), as amended by the Act of March 3, 1933 (p. 53, supra).

Further answering said petition, this defendant avers that prior to the Acts of June 30, 1932, and March 20, 1933, the petitioner's leave of absence with pay was prescribed by 44 U. S. C., Sec. 45, which provided, among other things, that an employee of the Government Printing Office shall be allowed such leave to the extent of not exceeding thirty days in any one fiscal year, under such regulations and at such times as defendant might designate, at the rate of pay received by such employee during the time in which such leave was earned; that said section further provided that such leave shall not be allowed to accumulate from year to year; that by regulation and practice established pursuant to said section, the employees of the Government Printing

Office earned, in the sense that they accrued, leave of absence with pay in one fiscal year and, in the discretion of the Public Printer, were granted such accrued leave in the following fiscal year; that this practice has been observed with respect to said petitioner, who was granted in the fiscal year 1931 the leave which had been accrued in the fiscal year 1930, and likewise he was granted in the fiscal year 1932 the leave which had been accrued in the fiscal year 1931; that during the fiscal year 1932, said petitioner had accrued $28\frac{1}{2}$ days' leave of absence with pay, but Section 103 of the so-called Economy Act of June 30, 1932, suspended for the fiscal year 1933, any right conferred upon said petitioner to receive leave; that thereafter, Section

4(d) of An Act to Maintain the Credit of the United
11 States Government, approved March 20, 1933, repealed said Section 103, effective April 1, 1933, thus restoring right to receive leave, but Section 215 (5 U. S. C., Sec. 30(a)), of the said Economy Act of June 30, 1932, had reduced to not exceeding 15 days any leave with pay which could be granted in any one year, and also provided that the part thereof unused in any year might be cumulative for any succeeding year.

This defendant further avers that in reply to his request for advice in the nature of a pre-audit as to leave of absence with pay of employees of the Government Printing Office, the Comptroller General of the United States, in an opinion (A-48206 and A-48311), dated April 21, 1933, held, in part, as follows:

“* * * that there may be granted during the remainder of the current fiscal year, or thereafter, the unused portion, if any, of the leave, not to exceed 15 days, which had accrued up to July 1, 1932, but in no case may credit be allowed for leave on account of service between June 30, 1932, and April 1, 1933, to be granted either in the current or any succeeding fiscal year. Hence, the maximum amount of leave with which the leave account of any employee of the Government Printing Office may now be credited is not to exceed 15 days of the unused leave which had been earned during the fiscal year 1932 plus $1\frac{1}{4}$ days per month for each month's service after March 31, 1933. * * *

This defendant further avers that between April 1, 1933, and June 30, 1933, the said petitioner applied for, was granted, and received $14\frac{1}{4}$ days' leave of absence with

pay, which leave had accrued during the fiscal year 1932 and was not in excess of 15 days which this defendant was authorized to grant, in his discretion, to said petitioner during the fiscal year 1933, or any other year thereafter.

This defendant further avers that on September 11, 1933, said petitioner applied to him for 14 $\frac{1}{4}$ days' leave of absence with pay, which the said petitioner claimed as the balance of leave which accrued during the fiscal year 1932; that defendant refused to grant the requested
12 leave; that said petitioner was not entitled to the requested leave for the reason that Section 215 of the Act of June 30, 1932, had reduced the annual leave that could be granted to him to 15 days, and 14 $\frac{1}{4}$ days thereof had been received by the said petitioner, and for the further reason that under 44 U. S. C., Section 45, said petitioner's leave not being cumulative from year to year, such leave, under the Government Printing Office regulations and practice, as accrued during the fiscal year 1932, must have been taken during, and before the expiration of, the fiscal year 1933, otherwise it was lost, and while said Section 215 permitted the maximum annual leave of 15 days, or the unused portion thereof, to accumulate from year to year, 14 $\frac{1}{4}$ days thereof were taken by said petitioner before the expiration of the fiscal year 1933, which left only three-fourths of a day to accumulate.

Further answering said petition, this defendant avers that the said petitioner is a civilian employee of the United States Government who receives annual leave with pay, within the purview of Section 215 of the Act of June 30, 1932.

Further answering said petition, this defendant is advised and believes and therefore avers that there does not exist between the United States Government and said petitioner, as an employee, any contract, express or implied, under which the latter is employed by the former, petitioner merely holding a position as proof-reader at the Government's Printing Office at Washington, D. C.; that petitioner has no property or contract right in his said position; that his alleged right to annual leave of absence with pay, claimed to be given petitioner by 44 U. S. C., Section 45, and whether or not alleged to be earned and
13 accrued prior to June 30, 1932, is not a vested, contractual or valuable property right, and does not con-

stitute an integral and essential part, term and condition of petitioner's employment; that petitioner's leave was not earned in the sense that his salary was earned, but merely earned in the sense that it accrued in connection with a privilege which was extended him by his employer, the United States Government; that 44 U. S. C., Section 45 does not grant to petitioner any absolute right to thirty days' leave of absence with pay in any one fiscal year, but on the contrary merely allows a privilege of leave *not exceeding* thirty days "under such regulations and at such times as" this defendant may designate; that this defendant is advised and believes and therefore avers that by reason of the nature of the relationship existing between the Government and said petitioner, the Congress of the United States, which extended him the leave privilege in the first instance, may suspend, reduce or revoke the same, in whole or in part, either before or after it has accrued.

Further answering said petition, this defendant is advised and believes and therefore avers that the provisions of law hereinbefore referred to, insofar as they reduce the petitioner's annual leave of absence with pay, are not unconstitutional, and do not violate the Fifth Amendment, or any other provision, of the Constitution of the United States, with reference either to the right to such leave which is alleged to have been earned and accrued prior to June 30, 1932, or the right to leave subsequent to said date, but, on the contrary, such provisions are entirely constitutional, lawful and valid.

Further answering said petition, this defendant says that his refusal to grant petitioner's application for the requested leave was and is based upon the opinion of
14 the Comptroller General hereinbefore referred to, and upon the provisions of Section 215 and other sections of the Economy Act, as amended, as well as upon the provisions of 44 U. S. C., Section 45 and regulations and practice adopted pursuant thereto.

Further answering said petition, and as separate and distinct defenses in addition to the foregoing, the defendant says that a writ of mandamus should not issue herein, for—

1. Rights of the United States of America to said petitioner's services and in connection with a financial saving to it in the reduction of petitioner's annual leave with pay

would be seriously and injuriously affected, and it is not a party to this proceeding.

2. This Honorable Court, in the exercise of the discretion which is confided in it in mandamus cases, should decline to issue a writ herein, for the granting thereof would partly defeat the intention and desire of the Federal Government to curtail expenses and otherwise effect economies in the maintenance and operation of the Government itself.

3. Plaintiff has and had another adequate remedy whether or not he, in fact and in law, has contractual rights which are being violated.

4. The granting of a writ of mandamus against this defendant might be a futile act, if the Comptroller General, who is not a party hereto, should thereafter continue to entertain the opinion hereinbefore quoted.

Wherefore, having fully answered the averments of said petition, this defendant prays that the rule to show cause be discharged, the petition dismissed, and that he be allowed his costs herein incurred.

GEORGE H. CARTER,
Public Printer.

LEO A. ROVER,
United States Attorney,
JOHN J. WILSON,
Assistant United States Attorney,
Attorneys for Defendant.

15 DISTRICT OF COLUMBIA, ss:

I, George H. Carter, Public Printer, do solemnly swear that I have read the foregoing answer to petition and return to rule subscribed to by me in my official capacity, and know the contents thereof; that the statements therein made of my personal knowledge are true, and those made as upon information and belief I believe to be true.

GEORGE H. CARTER.

Subscribed and sworn to before me this 19th day of December, 1933.

[SEAL.]

HENRY H. WRIGHT,
Notary Public, D. C.

Demurrer to Respondent's Answer.

Filed January 19, 1934.

* * * * *

Comes now petitioner, by his attorneys William E. Leahy and William J. Hughes, Jr., and demurs to respondent's answer to the petition herein and says that the said answer is bad in substance, and for reasons shows:

1. Petitioner's right to leave of absence with pay is conferred by the Act of June 11, 1896, c. 420, Sec. 1, 29 Stat. 453; 44 U. S. C. A. Sec. 45.

2 The said Act of Congress is the present grant of an absolute right. Section 103 of the Economy Act is prospective in operation and does not apply to rights to leave accrued prior to the passage of the Act.

3. The petition shows that petitioner's application for leave of absence with pay was denied solely on the ground of the alleged prohibition of the Act of June 30, 1932 and not on the ground that in the discretion of his superior officers the convenience of the service prevented it being granted.

4. While petitioner has no right to continue to be employed by the Government, nor to have the terms and conditions of his employment continued in future, where he has already performed services, the right to pay therefor and leave of absence with pay cannot be confiscated by retroactive legislation.

5. Leave of absence with pay is a valuable right, vested in petitioner, of which he cannot be deprived after he has performed services entitling him to it.

6. This is not a suit against the United States and the United States is not a necessary party.

7. No question of officers discretion in interpreting statute involved.

8. There is no discretion in this court permitting it to ignore a vested right whatever the economy achieved.

9. Petitioner has no other plain, adequate and complete remedy.

10. And for other causes that appear upon the record herein and may be argued at the hearing.

WM. E. LEAHY,
WM. J. HUGHES, JR.,
Attorneys for Petitioner.

Service acknowledged this 19 day of January, 1934.

JOHN J. WILSON,
Attorney for Respondent.

To John J. Wilson, Esquire, Attorney for Respondent:

Please take notice that the above demurrer will be heard in accordance with the rules.

WM. E. LEAHY,
WM. J. HUGHES, JR.,
Attorneys for Petitioner.

17 Supreme Court of the District of Columbia.

Wednesday, January 31, 1934.

Session resumed pursuant to adjournment, Hon. Daniel W. O'Donoghue, Justice, presiding.

* * * * *

This cause having been heretofore heard, argued and submitted upon the petition filed herein, the rule to show cause issued thereon, the answer to petition and the return to said rule and the demurrer to the respondent's answer, and after due consideration thereof, it is ordered that said demurrer to the respondent's answer be, and the same is hereby overruled. Whereupon, the petitioner now, in open Court, by his attorney of record elects to stand on said demurrer to respondent's answer, and judgment is accordingly ordered.

Wherefore, it is considered that petitioner take nothing by this action that respondent go hence without day, be for nothing held and recover of petitioner his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the petitioner by his attorney of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of

One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

February 24, 1934.—\$50 deposited in lieu of Undertaking on Appeal.

18

Assignment of Error.

Filed February 24, 1934.

* * * * *

1. The Court committed error in overruling petitioner's demurrer to answer of defendant to petition filed herein.

2. The Court erred in not sustaining the demurrer filed by petitioner to defendant's answer to petition filed herein.

WILLIAM E. LEAHY,

WM. J. HUGHES, JR.

Attorneys for Petitioner.

Copy received.

J. J. WILSON,

Asst. U. S. Atty., D. C.

Designation of Record.

Filed February 24, 1934.

* * * * *

The Clerk will kindly prepare as and for the record on appeal in the above entitled cause the following:

1. Original Petition, exhibit and Rule to Show Cause filed November 7, 1933.

2. Answer to Petition and Rule filed December 19, 1933.

3. Demurrer to Respondent's Answer filed January 19, 1934.

4. Judgment overruling Demurrer, petitioner electing to stand on Demurrer, January 31, 1934.

5. Memo: Appeal noted in open Court January 31, 1934.

6. Memo: Cost bond on appeal filed February 24, 1934.

7. Assignment of Errors.

8. This designation.

WM. E. LEAHY,

WM. HUGHES, JR.,

Attorneys for Petitioner.

19 Service of this Designation and Assignment of Error accepted this 24 day of February, 1934.

J. J. WILSON,
Asst. U. S. Atty., D. C.,
Attorney for Defendant.

20 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 19, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 83381 at Law, wherein William Field is Plaintiff and George H. Carter, The Public Printer, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of April, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6223. William Field, Appellant, vs. George H. Carter, The Public Printer. Court of Appeals, District of Columbia. Filed May 4, 1934. Henry W. Hodges, Clerk.

(5073-C)

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP - 5 1934

IN THE

Harry W. Hodges

CLERK

Court of Appeals of the District of Columbia

No. 6223.

WILLIAM FIELD, *Appellant*,

v.

GEORGE H. CARTER, PUBLIC PRINTER, *Appellee*.

BRIEF FOR APPELLANT.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Attorneys for Appellant,
Investment Building.

IN THE
Court of Appeals of the District of Columbia

No. 6223.

WILLIAM FIELD, *Appellant*,

v.

GEORGE H. CARTER, PUBLIC PRINTER, *Appellee*.

BRIEF FOR APPELLANT.

Statement of Facts.

The appellant entered the employ of the Government Printing Office on January 7, 1930, and has been employed there ever since. The Public Printer on July 20, 1929, promulgated a regulation to the effect that leave of absence earned in any fiscal year can only be taken in the next fiscal year. Thus, an employee entering the service in January, 1930 (during the fiscal

year 1930), could only take the leave of absence herein that year in the next fiscal year, i. e., after July 1, 1930 (R. 2-3).

The present appellant during the fiscal year 1931, i. e., between July 1, 1930, and June 30, 1931, earned thirty days leave of absence with pay, which he got in the next fiscal year, i. e., between July 1, 1931, and June 30, 1932. During the fiscal year 1932, i. e., between July 1, 1931, and June 30, 1932, he earned twenty-eight and one-half days leave of absence. This leave was not grantable except during the period from July 1, 1932, to June 30, 1933. However, the so-called Economy Act of June 30, 1932, provided:

“All rights now conferred or authorized to be conferred by law upon any officer or employee to receive annual leave of absence, with pay, are hereby suspended during the fiscal year ending June 30, 1933” (5 U. S. C. A., Sec. 673, Subsection 103, Pocket Part 1933).

This Act, therefore, as construed by the Government, deprived petitioner of his right to leave which he had earned the previous year during the only period wherein he could take it, i. e., between July 1, 1932, and June 30, 1933. The present petition for a Writ of Mandamus presents the question whether the above section of the Act has been properly interpreted by the Government in construing it to confiscate leave already earned at the time of its passage or, in the alternative, whether, if this is its proper construction, the statute is constitutional.

Jurisdiction of the Lower Court.

The Government's contention that the Court below

has no jurisdiction under Section 111 of the Economy Act (5 U. S. C. A., Sec. 673, Subsection 111, Pocket Part 1933), purporting to deprive all courts of jurisdiction of any suit under the Act unless it involved the Constitution of the United States, and Section 9 of the Act of March 20, 1933 (5 U. S. C. A., Section 673, Subsection 9, p. 55, Pocket Part 1933), to the same effect, is of no application to the present case for the reason that if, as contended by petitioner, Section 103 of the Economy Act is *prospective* in operation then the Economy Act does not apply to leave of absence earned prior to its passage and hence the suit is not based upon the Economy Act. On the other hand, if Section 103 of the Economy Act be construed to confiscate leave already earned at the time of its passage, petitioner's contention is that it is unconstitutional to that extent. Hence, the case in this aspect would involve the Constitution of the United States and this Court would not be deprived of jurisdiction under Section 111 of the Act.

I.

This Is Not a Suit Against the United States and the United States Is Not a Necessary Party.

This is a suit to compel defendant to exercise a ministerial function, i. e., to grant leave with pay, which leave with pay would, according to the officers in question, be granted were it not for the provisions of the Economy Act. In this sense, therefore, defendant is simply withholding the granting of leave with pay and the present case is analogous to *McCarl v. Cox*, 56 App. D. C. 27; *McCarl v. Pence*, 59 App. D. C. 159, and the ruling case of *Smith v. Jackson*, 246 U. S. 388, 62 L. Ed. 788. In all of these cases the Comptroller Gen-

eral had deducted pay, which deduction was illegal. Suits for mandatory injunctions were filed. In each case it was held that it was not a suit against the United States. Note that the same question was raised in *Mare v. Alexander*, 2 F. (2d) 895, wherein the remedy was sought and granted by mandamus. In *Dillon v. Gross*, 299 F. 851, likewise a mandamus suit, it was likewise granted.

In *United States v. Jones*, 18 How. 92, 15 L. Ed. 274, an Army officer was wounded in France and the Secretary of the Navy sent him \$1,000.00 to pay for his treatment. It was later deducted from his pay and he sued for it. In holding that it could not be deducted from his pay later on the Court said:

“The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his Department. He is responsible to the people and the law for any abuse of the powers entrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and the laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments.”

II.

Leave With Pay Is a Property Right.

The mere statement of this position seems to be its proof. If *leave of absence* be regarded as a thing of value, it is obvious that an individual with the right to obtain leave of absence would be guided in a given sit-

uation as to whether he should take it or refuse it, by the consideration of whether he would be paid during the period of his absence. It is obvious that his family situation or his private finances might be such that it would be impossible for him to take leave of absence unless he was paid during the period of his absence. The last section of the Printing Office leave statute (44 U. S. C. A., Sec. 45) to the effect that the Public Printer is authorized to pay to the legal representatives of any employees who may die, and who have any accrued leave of absence due them, the amount of their salary represented by the amount of the accrued leave of absence is a statutory recognition that leave with pay is a property right.

It being the policy of the law that leave of absence should be granted upon the theory that reasonable vacations promote efficiency, it is to the benefit of the United States to couple with the grant of such leaves an incentive to the individual to take them, i. e., pay during the absence. Or, putting it conversely, the granting of pay during the leave of absence removes the only obstacle in the way of an employee taking it. Hence, leave of absence with pay is for the benefit of the United States as well as the individual.

This has been recognized for a long time. In *United States v. Barringer*, 188 U. S. 577, 592, 47 L. Ed. 602, 608, the Supreme Court had before it a case wherein leaves of absence in the Printing Office for the years 1887, 1888, 1889 could not, because of the necessities of the service, be taken. Congress passed legislation granted the employees who had not been able to take their leave, a certain rate of pay for each day of accrued leave not taken. It held that such a statute fully applied to permanent employees and not to temporary employees.

The "pay" element of leave of absence with pay would be sufficient, without any other argument, to show that leave of absence with pay is a valuable right. No authority need be cited that money is a valuable thing. Once the right of leave of absence with pay has accrued it is a vested right of which the employee cannot be constitutionally deprived. It will no doubt be conceded that Congress cannot constitutionally deprive persons of vested rights. The annotations to the Fifth Amendment are filled with cases on this elementary principle (see 12 C. J. 955 and cases cited). As to what is a vested right the courts have said:

"Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

Cooley Const. L., 351;

Pearsell v. Great N. R. Co., 161 U. S. 646.

It has also been stated to be:

"An immediate right of present enjoyment, or a present fixed right of future enjoyment."

4 *Kent Comm.* 202.

In the present case the plaintiff's right to the leave with pay requested having accrued prior to June 30, 1932, it was "a present fixed right of future enjoyment" which made it a vested right.

An analogous case is that of a pension, which is conceded to be a mere gratuity given by the State (*United States v. Teller*, 107 U. S. 64). However, once any given installment of a pension is due, the United States cannot deprive a person of it. Thus in *McFarland v. Bieber*, 32 App. D. C. 513, it was contended by the plaintiff that a provision of an Act of Congress requir-

ing him to contribute \$1.00 a month to a pension fund ripened into a vested property right to a pensioner on his retirement from the service. The court on the authority of *Pennie v. Reis*, 132 U. S. 464, held that the plaintiff had no vested right in the fund such that, by repeal of the law, his right might not be taken away from him. It held that the fund was created by Congress and that no pensioner acquires any vested right in future pension payments. However, the Court held that once the contingency upon which the right depended had occurred, i. e., retirement, the right to the amount then due had vested and such amount could not be withheld. The Court said:

“Any amount due and payable at the time of the happening of the event (the making of the order discontinuing his pension) had vested, and could not be withheld.”

Referring to *Pennie v. Reis*, supra, the Court said:

“Further, the right to the insurance vested at the death of the insured, provided the law was still in force. The whole of the amount of the insurance at once became due and payable. Here all that had become vested was the amount of the pension due and payable on the date of its discontinuance by the order of the Commissioners.”

There is no difference, in essentials, between a law giving a person a pension payable the first of each month and a law giving a government employee right to leave with pay, which leave accrues the first of each month. If, in the case of the pension, once an installment is due, Congress cannot pass a law retroactively destroying the plaintiff's right to it, similarly, once the right to leave has accrued Congress cannot constitu-

tionally, by a retroactive law, destroy such right. In each case Congress would be confiscating a property right. Once it is conceded that the right to leave with pay, which leave has already accrued, is a property right, it follows that a person cannot be deprived of it by Congress without just compensation. The answer of the Government that the legislation attempting to deprive the plaintiff of this right is part of an economy program which is no doubt beneficial to the country as a whole is met by the apt words of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, wherein he said:

“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant our achieving our desire by a shorter cut than the constitutional way of paying for the change.”

Mr. Justice Holmes' words are peculiarly applicable to the present case. It certainly cannot be contended in this court at this late date that Congress can take property from one individual either for the benefit of others or the country as a whole without paying for it. The right to leave of absence with pay is similar to the right of an individual to the use of his property. Thus, in *Brownlow v. O'Donoghue Bros., Inc.*, 51 App. D. C. 114, the Commissioners of this District felt that it would be beneficial to the city as a whole to block up a certain entrance to the plaintiff's property. The court held that there was no authority for impairing the use of the property by the owner even upon the theory that it would benefit the public generally if this were done. Analogous to the present case is a defendant's right to the statute of limitations once the statute has tolled. This question was exhaustively considered

in *Moore v. State*, 43 N. J. L. 203, which was referred to in *U. S. v. Salberg*, 287 Fed. 208, 213, as a case which exhausted the argument on both sides of the proposition. In that case it was clearly held that a statute of limitations, once it had run, created in a defendant a vested right of which he could not be deprived. It cites numerous cases to the same effect. The analogy between such a case and the present is the *time of accrual of the right*, leading to the conclusion in each case that once the right has accrued, a person asserting it cannot be deprived of it.

III.

There Is No Authority for the Belief That Because the Constitutional Prohibition Against Impairing the Obligations of a Contract Does Not Apply to the United States, the United States May Indiscriminately Destroy Contract Rights.

The requirements of the Fifth Amendment that no person shall be deprived of *property* without due process of law applies to the United States. The contention of defendant's that the Constitution does not prohibit Congress from impairing the obligations of a contract is no answer to the present suit. This simple solution of confiscatory legislation has been expressly repudiated by the Supreme Court. Thus, in the *Sinking Fund* cases, 99 U. S. 700, the Supreme Court said:

“The United States cannot, any more than a State, interfere with the private rights, except for legitimate governmental purposes. They are not included within the Constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving

persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. * * * The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or any contract the subsidy bonds, without the consent of the corporation. All this is indisputable."

A contract with a railroad under which the railroad receives a grant of public lands for building the road is no different in essentials from a contract with a Government employee under which the Government employee bargains for a fixed sum and under fixed conditions for labor to be performed with the sweat of his brow. The relationship of the Government with an employee under the Civil Service can only be regarded as a contractual relationship. In what other way is it possible to view it? Under what branch of the law does it come if not under that of contracts? Is it to be imagined that a person working for the Government does so in the relationship of a pure *privilege*? If so, Congress by an Act passed on the 1st of July might forfeit to the Government and confiscate retroactively a Government employee's entire pay for the month of June, or it might confiscate the entire pay of only *certain* Government employees or *certain classes* of Government employees, and hence, the Government employee would perform his labor by a sort of sufferance with the prospect that at the end of any given month he might be handed a largess of \$100.00 or a

pittance of \$5.00. In this way the relationship of an employee to his Government would be that of a sort of benevolent slavery wherein at all times he would be at the mercy of retroactive Acts of Congress drastically affecting his property and even his liberty.

Once depart from the theory of the relationship of the employee with his Government as a contractual relationship legal chaos results. In every other branch of its activities, in the purchase of supplies, in the erection of buildings, in the building of ships, in carrying the mails, in every sphere of activity wherein the Government must deal as a Government with private individuals, in each case the Government deals with such individuals contractually. It cannot be heard to argue that in the one and only instance of its relationship with its employees, wherein it is bargaining for the labor of hands and of minds, that such a relationship is not contractual but a vague, indistinct relationship falling into some unknown legal classification.

It follows inevitably from the above that the relationship between a Government employee and the Government with respect to the terms of his employment is contractual in character and that the terms of such contract of employment must be lived up to by the Government or that, if broken, just compensation must be awarded the employee. Every suit in the Court of Claims by an officer or employee of the United States for pay or allowances, from the creation of that Court to the present day, is a standing answer to the claim that the relationship between the Government and its employees with respect to their employment is not contractual in character.

This being so, every essential term of the agreement, as constituted by the various Acts of Congress under which a Government employee accepts his position and

performs labor under it must be lived up to by the Government. That the right to annual leave of absence with pay is one of the essential parts of such an agreement would seem obvious. Not only is it a valuable thing, of benefit to the employee (and also to the United States, which derives in increased efficiency the benefit of the employee's period of rest and recuperation) but it is easy to see that in many cases it may be a determining factor for the employee entering the Government's service. As between the Government on the one hand offering a stenographer \$100.00 a month and thirty days leave with pay and on the other hand a private concern offering \$100.00 a month and two weeks leave without pay, it is obvious that the Government position is the more valuable of the two and the one which the prospective worker would accept. Perhaps in accepting it he might sacrifice an unusual prospect of advancement which in some cases a private concern might offer. Perhaps in taking the Government position the employee fully realizes this but is willing to accept the limitations provided by law and custom upon salaries paid by the Government in order to obtain the annual period of recreation which may be necessary to the individual's well-being. Perhaps in this way the Government obtains at a cheaper monetary rate skilled employees who otherwise would not consider Government positions. If so, the gross unfairness of the Government repudiating that part of its contract, offering the employee annual leave, with pay, and repudiating it retroactively, after it has accrued, is apparent. When added to this is the gross inequality of the Act of June 30, 1932, operating to allow those leave of absence with pay who had taken their pay prior to the date of the Act but denying it to those whose right to it had already accrued but who did not,

or could not, take it, a situation of unexampled inequality and of confiscatory legislation is presented which should arouse the resentment of any court of justice to whom the supreme power of Congress is presented as a defense.

The decision of the Supreme Court in the *Sinking Fund cases*, supra, that the Government is bound by the due process provisions of the Constitution in dealing with individuals has been repeatedly approved.

Seaboard Air Line R. Co. v. R. R. Com., 155 F. 804;
Walker v. U. S., 139 F. 413;
In re Pacific Ry. Com., 32 F. 260, 262;
U. S. v. Stanford, 161 U. S. 433;
U. S. v. Board of R. R. Com., 71 F. 439, 441.

The brief of the appellant in the *Sinking Fund cases*, supra, contains an unanswerable argument against the proposition that the United States, merely because the provision against impairment of the obligations of a contract contained in the Constitution does not apply to it, can ride roughshod over Constitutional rights. To the same effect is:

Wilkinson v. Leland, 2 Pet. 567;
Shields v. Ohio, 95 U. S. 324;
Calder v. Bull, 3 Dall. 388;
Loan Ass'n v. Topeka, 20 Wall. 655;
Duer on Constitutional Jurisprudence, 356.

See also the able dissenting opinion of Mr. Justice Roberts in the recent case of *Snyder v. Massachusetts*, 291 U. S. 97, 133.

Upon examination of the cases purporting to hold that the Constitutional prohibition against impairing the obligation of contracts does not apply to the United

States, it will be found in every case that while this is so, the court is careful to show that the United States has not impaired the obligation in the particular case and has not violated the due process clause. As an example of this is *Serrellas v. Esbri*, 200 U. S. 103, wherein an Act of Congress applicable to Porto Rico was held not to have impaired the obligations of a contract. If, through the medium of the due process clause the Constitutional prohibition against the impairment of the obligation of a contract were not applicable to the United States, there would have been no case before the Supreme Court for decision in the *Serrellas* case, *supra*.

Cases such as *Louisville & Nashville R. Co. v. Motley*, 219 U. S. 467, wherein the Hepburn Act prohibiting passes on railroads was held to destroy the right of a person to an annual pass which had been given in settlement of a suit, the basis of the decision was that Congress, having complete power over Interstate Commerce, both parties in effecting such a settlement were on notice that the medium of the settlement might by Congressional enactment be rendered invalid.

The *Legal Tender* cases, 12 Wall. 457, are no authority for the Government's present contention. The basis of the decision therein, like the basis of so many decisions with regard to alien property legislation during the World War, is simply that the sovereign, for proper cause, may subject the contracts between individuals to a paramount governmental necessity and even here the legislation was held uniform.

In the present case it is not contracts between individuals which are involved but a contract between an individual and the Government. The present case amounts to a direct taking of property without just compensation or due process and not mere consequen-

tial injuries resulting from the exercise of lawful power.

Legal Tender Cases, 12 Wall. 457, 680;
Louisville R. Co. v. Motley, 219 U. S. 482.

IV.

No Question of Interpretation of Statute Involved.

The contention of the Government that respondent refused petitioner's application for leave as a result of an interpretation of the provisions of said Economy Act based upon the exercise by them of a sound administrative discretion, which discretion, not being arbitrary or capricious under the circumstances of this case, cannot be controlled by mandamus seems without the merit.

If a Cabinet Officer's construction of a statute, unless it were arbitrary or capricious, were incapable of review, the law would be made by Cabinet Officers and not by the courts. The Government's contention is a time-honored misapprehension which has been expressly repudiated on a number of occasions. In the leading case of *Roberts v. U. S.*, 176 U. S. 222, the Supreme Court had this to say on the subject:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed

by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

To the same effect is *United States ex rel. Rodriguez v. Bowyer*, 25 App. D. C. 121, wherein it was held that members of the United States Board of Labor Employment at the United States Navy Yard in this city are ministerial officers and their duty to register an applicant for employment does not cease to be ministerial because they rest their refusal or resignation on the determination of a pure question of law involving the ascertainment of no fact whatever. This is the exact situation in the present case wherein the respondent has refused to grant the leave with pay requested on

the ground alone of Section 103 of Part 2 of the Economy Act. To the same effect is:

Payne v. U. S., 20 App. D. C. 600, 603;
U. S. v. Hitchcock, 19 App. D. C. 342, 346;
McFarland v. Miller, 18 App. D. C. 564;
Roberts v. Valentine, 13 App. D. C. 38;
 Also note *Cook v. Iverson*, 52 L. R. A. (N. S.)
 436.

It seems to petitioner that the claim of the respondent that the writ should be denied on the ground that they have construed the law is of the shallowest basis; they have construed it only in the sense that they have applied it in an unconstitutional manner. This is not construction but application of the law.

V.

The Printing Office Leave Statute (44 U. S. C. A., Sec. 45) Is an Absolute Grant Mandatory in Form.

The Act of Congress under which the present petitioner applied for leave reads as follows:

“LEAVES OF ABSENCE.—Employees of the Government Printing Office, * * * shall be allowed leaves of absence, with pay, to the extent of not exceeding thirty days in any one fiscal year under such regulations and at such times as the Public Printer may designate, at the rate of pay received by them during the times in which said leave was earned.”

It should be noted that the above Act is mandatory in form. It states that leave of absence “*shall* be allowed.” In the analogous case on leave of absence to

Navy Yard employees under the Act of June 29, 1916 (34 U. S. C. A., Sec. 511), the Comptroller stated:

“Leave with pay provided for by the legislation of August 29, 1916, is an absolute grant to the extent that it is made an executive duty to grant it, the only discretion being as to the time when it can best be allowed.”

No such discretion is involved in the present case for the reason that, as said by the Government, the petitioner would be granted his leave were it not for the alleged legal bar of the Economy Act.

It should be noted that the Act of Congress providing leave of absence for Government Printing Office employees is entirely different in its mandatory form from other leave statutes. Thus, the general leave of absence law states:

“The head of any department *may grant* thirty days annual leave” (5 U. S. C. A., Sec. 30).

With reference to the Agricultural Department the law reads:

“The employees of the Department of Agriculture * * * *may* in the discretion of the Secretary of Agriculture be granted leave of absence” (5 U. S. C. A., Sec. 534).

With respect to the Department of Commerce:

“The Secretary of Commerce, at his discretion, *may grant*” (33 U. S. C. A., Sec. 863).

With respect to the Railway Postal Service:

“The Postmaster General *may allow* railway postal clerks an annual vacation” (39 U. S. C. A., Sec. 635).

On the other hand, it is noticeable that the statutes with reference to those employees who are compelled to perform arduous and confining labor, sometimes dangerous in character, are, like the present statute, mandatory in form. Thus, with respect to employees of the Navy Yard, the statute reads:

“Each and every employee of the Navy Yards * * * is hereby granted thirty days leave of absence each year, without forfeiture of pay” (34 U. S. C. A., Sec. 511).

With respect to the Bureau of Engraving and Printing:

“The employees of the Bureau of Engraving and Printing * * * *shall be* allowed leave of absence with pay” (31 U. S. C. A., Sec. 172).

With respect to Postal Employees:

“Employees in the Postal Service *shall be* granted fifteen days leave of absence” (39 U. S. C. A., Sec. 823).

With respect to the Printing Office:

“The employees of the Government Printing Office * * * *shall be* allowed leaves of absence with pay” (44 U. S. C. A., Sec. 45).

VI.

**The Claim That Mandamus Should Not Issue Due to
The Court's "Judicial Discretion."**

While it is true that courts issue mandamus not as a matter of strict right but in their discretion, such discretion means their judicial discretion, not an arbitrary refusal or denial to consider an individual right on the theory that it is not of as much importance as what a court may privately believe to be a laudable governmental policy. A right is a right; once it is shown to exist no court can ignore it however desirable it might consider a legislative program which might turn out a success were it not for its unconstitutional invasion of the petitioner's legal rights. There is no right in Congress or the courts superior to the Constitution, and however much Congress may desire to economize it can only do so by a constitutional method. As Mr. Justice Holmes said, *supra*, we cannot take a shorter cut than the constitutional method of paying for the change. As to the "judicial discretion" involved upon mandamus it has been said:

"The discretion which the Court may exercise is not an arbitrary discretion, but a judicial or legal one to be exercised on equitable principles, and in accordance with well settled rules of law."

38 C. J. 549;

U. S. v. Lane, 249 U. S. 367;

U. S. v. Burleson, 49 App. D. C. 26;

Duncan Town Site v. Lane, 245 U. S. 308;

Arant v. Lane, 249 U. S. 367.

Certainly no sound judicial discretion can be shown in ignoring the right of one person on the theory that

it would be beneficial to everyone else to have it ignored. No application of equitable principles is involved in ignoring a legal right.

As to another remedy petitioner knows no other way of obtaining the legal entity "leave of absence with pay" other than by mandamus. It is not the pay alone that the petitioner is attempting to obtain, nor the leave of absence alone, it is the dual entity "leave of absence with pay." It is idle to contend that petitioner could take leave of absence without pay and then sue the Court of Claims for the pay. "Leave of absence without pay" is itself a legal entity; if petitioner requests it and obtains it his rights are fixed by what he asks for and what he gets. He cannot later on convert it into a disapproved application for leave of absence with pay, with the annexed claim that while he got the leave of absence he did not get the pay. It cannot be seriously suggested that either by this method, or by arbitrarily remaining away from work and later suing for his pay (after running the risk of being discharged) petitioner can achieve a full, adequate and complete remedy.

VII.

The Government's Argument That the Cumulative Feature of Section 215 of the Economy Act Puts the Petitioner Out of Court Is Unsound.

It seems to be argued by the Government that because the Economy Act first renders leave cumulative that the Economy Act is necessary to the petitioner's right of action and that, being necessary, arguendo, petitioner cannot both rely upon it and assail it. Petitioner is not compelled to rely upon the cumulative feature of Section 215 of the Economy Act to sustain

his right of action. Section 103 of the Economy Act in *suspending* his right to leave for a year may be construed not as destroying his vested right to his leave with pay but as expressly recognizing it, although suspending his right to the present enjoyment of it for a reasonable period. It is the Governmental construction of the Economy Act, to the effect that first having suspended the leave, it then confiscates it, which is assailed in the present suit. The suspension of the leave operated to preserve the right during the period of the suspension. It is the retrospective construction of Section 215 to confiscate earned leave which is assailed.

As to the contention that petitioner, upon the enactment of the Act of March 20, 1933 (5 U. S. C. A., p. 54, 1933 Supp.), should have applied for his leave between March 20 and July 1, 1933, this Court, under the generous judicial notice ruling of the Supreme Court in the *Home Building and Loan Association v. Blaisdell* (the so-called Minnesota case opinion rendered January 8, 1934, Supreme Court of the United States Advance Sheets) can take judicial notice that if all of the employees of the Government Printing Office had applied for their accrued leave between March and July, 1933, the operation of the Government Printing Office would have come to an end.

CONCLUSION.

Statutes Must Be Interpreted in Such a Way as Not to Render Them Unconstitutional.

Leave of absence earned prior to the passage of the Economy Act was equally as valuable a right as pay earned. If it is beyond the power of Congress to con-

fiscate plaintiff's pay already earned, it is likewise beyond its power to confiscate leave of absence already earned. The statute, therefore, must be construed prospectively and held to refer only to leave of absence earned in futuro, subsequent to the passage of the Economy Act. The judgment below should be reversed.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP 23 1934

No. 6223

Henry W. Hodges
CLERK

In the United States Court of Appeals
for the District of Columbia

APRIL TERM, 1934

WILLIAM FIELD, APPELLANT

v.

GEORGE H. CARTER, THE PUBLIC PRINTER, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF FOR APPELLEE

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**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1934

No. 6223

WILLIAM FIELD, APPELLANT

v.

GEORGE H. CARTER, THE PUBLIC PRINTER, APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The appellee deems the statement of facts in appellant's brief not to be sufficiently full and complete to present the questions for review and therefore submits the following statement of the case (Rule 8, Section 4).

The judgment appealed from was entered in the court below upon the overruling of appellant's demurrer to the answer filed by appellee in response to the appellant's petition for mandamus (R. 15).

The appellant, who is employed as a proofreader in the Government Printing Office, sought by his petition to compel the appellee, as the Public

Printer and head of the Government Printing Office, to grant him 14 $\frac{1}{4}$ days' leave of absence with pay, for which appellant had applied on September 11, 1933, as being unused leave of absence with pay claimed to have been earned by the appellant in the fiscal year which ended June 30, 1932 (R. 5-6). The appellee's refusal to grant the desired leave was based upon several things, namely: the decision of the Comptroller General given to the appellee on April 21, 1933, at the latter's request (R. 10); the provisions of Section 215 and other sections of the so-called Economy Act, as amended; as well as upon the provisions of the Government Printing Office leave statute, and regulations and practice adopted pursuant thereto (R. 12), all of which will be hereinafter more fully explained.

By virtue of the power reposed in him by the provision of 44 U.S.C., Section 45, the then Public Printer, on July 20, 1909, promulgated a regulation which provided that leaves of absence earned in any fiscal year (July 1st to June 30th), are payable in the discretion of the Public Printer on the recommendation of a chief of section or foreman of division immediately after the close of the fiscal year during which said leave of absence was earned (R. 9-10).

The appellant in this case received his probationary appointment on January 8, 1930, as a proof-reader in the Government Printing Office, and his permanent appointment on July 8, 1930 (R. 8).

During the fiscal year 1931, that is to say, between July 1, 1930, and June 30, 1931, the appellant earned (in the sense that this term is hereinafter used) 30 days' leave of absence with pay, which leave, in accordance with the above regulation, was granted to the appellant during the fiscal year 1932, that is to say, between July 1, 1931, and June 30, 1932 (R. 10).

During the fiscal year 1932 the appellant earned (as that term is hereinafter defined) $28\frac{1}{2}$ days' leave of absence with pay. This leave was not grantable until during the 1933 fiscal year, but Section 103 of the so-called Economy Act of June 30, 1932, *supra*, suspended the right to annual leave during that year (R. 10).

However, the Act of March 20, 1933, repealed Section 103, effective as of April 1, 1933.

Thereafter, and between April 1, 1933, and June 30, 1933, the appellant applied for and received $14\frac{1}{4}$ days' leave, which had been "earned" during the 1932 fiscal year. He did not apply for any more leave during the fiscal year 1933, and, as stated above, the $14\frac{1}{4}$ days which he is now seeking, and which is the remainder of "earned" leave during the 1932 fiscal year, was not applied for until September 11, 1933 (R. 10-11).

In reply to the appellee's request for advice in the nature of a preaudit as to leave of absence with pay of employees of the Government Printing Office, the Comptroller General, in an opinion

(A-48206 and A-48311) dated April 21, 1933, held, in part, as follows (R. 10) :

* * * that there may be granted during the remainder of the current fiscal year, or thereafter, the unused portion, if any, of the leave, not to exceed 15 days, which had accrued up to July 1, 1932, but in no case may credit be allowed for leave on account of service between June 30, 1932, and April 1, 1933, to be granted either in the current or any succeeding fiscal year. Hence the maximum amount of leave with which the leave account of any employee of the Government Printing Office may now be credited is not to exceed 15 days of the unused leave which had been earned during the fiscal year 1932 plus $1\frac{1}{4}$ days per month for each month's service after March 31, 1933. * * *

STATUTORY PROVISIONS INVOLVED

The leave of employees of the Government Printing Office is prescribed by Section 45 of Title 44 of U.S.C., as follows:

LEAVES OF ABSENCE.—The employees of the Government Printing Office, whether employed by the piece or otherwise, shall be allowed leaves of absence with pay to the extent of not exceeding thirty days in any one fiscal year under such regulations and at such times as the Public Printer may designate at the rate of pay received by them during the time in which said leave was earned; but such leaves of absence shall not be allowed to accumulate from year to year.

Such employees as are engaged on piece-work shall receive the same rate of pay for the said thirty days' leave as will be paid to day hands. It shall be lawful to allow pay for pro rata leave to those serving fractional parts of a year; also to allow pay for pro rata leave of absence to employees of the Government Printing Office in any fiscal year, notwithstanding the fact that thirty days' leave of absence, with pay, may have been granted to such employees in that fiscal year on account of service rendered in a previous fiscal year. The Public Printer is authorized to pay to the legal representatives of any employees who may die, and may have any accrued leave of absence due them as such employees, said claims to be paid out of any appropriations for leaves of absence (June 11, 1896, c. 420, Sec. 1, 29 Stat. 453).

Section 103 of the so-called Economy Act of June 30, 1932 (5 U.S.C.A., page 47, 1933 Part), is in the following language:

All rights now conferred or authorized to be conferred by law upon any officer or employee to receive annual leave of absence with pay are hereby suspended during the fiscal year ending June 30, 1933.

Section 111 of the same Act is as follows:

No court of the United States shall have jurisdiction of any suit against the United States or (unless brought by the United States) against any officer, agency, or instrumentality of the United States arising out of

the application of any provision of this title, unless such suit involves the Constitution of the United States.

NOTE.—Section 9 of the Act of March 20, 1933, Chapter 3, 48 Stat. 12 (5 U.S.C.A., page 55, 1933 Part), is in identical language.

The pertinent provision in Section 215 of the Act of June 30, 1932 (5 U.S.C. 30a), is as follows:

After June 30, 1932, no civilian officer or employee of the government who receives annual leave with pay shall be granted annual leave of absence with pay in excess of 15 days in any one year, excluding Sundays and legal holidays: *Provided*, That the part unused in any year may be accumulated for any succeeding year: * * *

The Act of March 20, 1933 (5 U.S.C.A., page 55, 1933 Part), by paragraph (d) of Section 4 thereof, repealed Section 103, *supra*, effective April 1, 1933.

ARGUMENT

The defense is mainly based upon the following several grounds:

1. The courts have no jurisdiction in this case.
2. Section 215 of the so-called Economy Act of June 30, 1932, deprives the appellant of the leave which he seeks.
3. The appellant has waived or lost the leave which he seeks by not applying for it before the expiration of the 1933 fiscal year.
4. Mandamus does not lie in this case for the various reasons hereinafter mentioned.

Congress has expressly divested the courts of jurisdiction

By reason of the provision of Section 111 of the Act of June 30, 1932, *supra*, and of similar provision in Section 9 of the Act of March 20, 1933, *supra*, it is submitted that the court is deprived of jurisdiction. The appellee contends that this suit arises out of the application of Section 215 of the so-called Economy Act. It appears from the appellant's brief (pages 2 and 3) that he considers Section 103 of the same Act involved. (We do not agree with him, however, that Section 103 is the provision of law around which this controversy revolves.) The court's attention is directed to the fact that Section 111, *supra*, mentions suits under "this title", apparently meaning Title I of the so-called Economy Act, which embraces Sections 101 to 112, thus including Section 103. Section 215 was contained in Title II of the same Act. However, Section 9 of the Act of March 20, 1933, *supra*, contains language identical with Section 111 of the Act of June 30, 1932, *supra*, and is included in Title II of the amendatory Act of March 20, 1933, which title also contains an amendment (not important herein) to Section 215. It is therefore felt that the combined effect of Section 111 of the June 30, 1932, Act, and of Section 9 of the March 20, 1933, Act is to make the provisions thereof embrace the present suit. That being so we further submit that this

suit does not involve the Constitution of the United States, in that, for the reasons hereinafter set out, it does not involve any substantial constitutional question. Compare *McCarl et al. v. Hoepfel*, 62 App. D.C. 393.

II

This controversy is not a subject for judicial cognizance

While some of the elements of this proposition will be hereinafter elaborated upon, it is deemed proper at this point, where the court's jurisdiction is being discussed, to submit that controversies between the United States Government and its employees, in respect of annual leave, removals, promotions, ratings, and other matters similarly incident to an employee's position or work, are wholly within the competence and cognizance of the political departments (either executive or legislative), and therefore the action of Congress or the head of an executive department in connection therewith should not be subject to be reviewed or controlled by a court. Compare *Keim v. United States*, 177 U.S. 290; *U.S. ex rel. Taylor v. Taft*, 24 App. D.C. 95, writ of error dismissed, 203 U.S. 461; *Persing v. Daniels*, 43 App.D.C. 470; and *Longfellow v. Gudger*, 57 App.D.C. 50.

This should be particularly so, not only because public policy requires it, but for the reason that, as hereinafter pointed out, there is no contractual relationship between the Government and its em-

ployees, and the latter have no vested right, title, or interest in or to their employment. To maintain that Congress may not deal with Government employees as it sees fit, even though in doing so the privileges or benefits theretofore enjoyed might be curtailed, revoked, or otherwise interfered with, or to claim that Congress did not mean what it said when it enacted the provisions of law involved herein, is to argue idly to no logical result. Such controversies should be beyond the pale of judicial inquiry, as they are purely problems of federal internal management and administrative house-keeping, so to speak. The machinery of the courts should not be available to Government employees seeking extraordinary remedial assistance in connection with some grievance, imaginary or otherwise, suffered by them at the hands of a generally liberal and considerate employer. Employees of private business have no such privilege. Why, then, should Government employees?

III

This is a suit against the United States

Assuming, *arguendo*, that this court has jurisdiction of the subject matter, this suit is, in effect, one against the United States. The United States is the only party interested insofar as possible defendants are concerned. The appellant is an employee of the United States, and his pay comes out of the Federal Treasury. To require this appellee

to grant the appellant the 14¼ days' annual leave of absence with pay would result in the United States temporarily being deprived of the appellant's services for that time, and it would entail the payment to him of federal funds not appropriated for that purpose. Furthermore, the United States, as employer, speaking through its Congress, has said in effect that this appellant may not receive the leave sought by him. In addition thereto, it is clear that the defendant (appellee) named in this suit has no personal interest in the subject matter, nor any official authority to grant the relief sought.

Belknap v. Schild, 161 U.S. 10.

International Postal Supply Co. v. Bruce,
194 U.S. 601.

Wells v. Roper, 246 U.S. 335.

Washington Steel and Ordnance Co. v. Martin, 45 App. D.C. 600.

The authorities relied upon by counsel for appellant upon this phase of the matter are not analogous. For example, this court pointed out in *McCarl v. Cox*, 56 App. D.C. 27, at page 29, that it was "not contended that express authority is to be found therein justifying the action here challenged." This is exactly the converse of the situation in the case at bar, for the contention of the appellee herein is that the express mandates of Congress are controlling him in this matter.

IV

Section 215 reduces appellant's leave

At the beginning of the 1933 fiscal year, Section 103 had suspended any privilege which the appellant had to enjoy the leave of 28½ days which accrued to him during the preceding year. When Section 103 was repealed, effective as of April 1, 1933, Section 215, reducing the appellant's annual leave of absence to 15 days, and at the same time making any unused portion thereof cumulative, became operative. As pointed out above, after April 1, 1933, and before June 30, 1933, the appellant enjoyed 14¼ of the 15 days leave which was in the appellee's power to grant. Section 215 made it mandatory upon the appellee not to grant the appellant (a civil employee of the Government) more than 15 days' leave, regardless of the fact that there had accrued to him during the preceding fiscal year 28½ days. The conclusion must be reached that the appellee was expressly prevented by this section from granting appellant more than 15 days.

The question then arises as to whether Congress had the power to enact the provisions of Section 215 in the light of the instant situation. The contention of the appellant seems to be that "earned" leave is a valuable vested and contractual property right of which he cannot be deprived without due process of law.

An analysis of the statute governing leave for Government Printing Office employees discloses that, while it contains an expression as to leave being "earned", there is no absolute grant to an employee that he will be allowed 30 days' leave in any one fiscal year. The Court of Claims, in discussing a prior Government Printing Office leave statute in *Harrison v. United States*, 26 Ct. Cl. 259, stated as follows, on pages 270-271:

The law imposes both the duty and the responsibility of granting or refusing leaves of absence exclusively upon the Public Printer. It is his duty to administer the statute according to its spirit and intent and with a proper regard to the just interests of both parties. He is authorized to administer it by "regulations", and may prescribe general rules which would practically exclude individual applications. He may make the leave of absence dependent upon good conduct, and in the exigency of pressing work, when other employees could not be procured, he would be justified in refusing it altogether. *The employee has no legal right to a leave of absence until it be granted*, and can no more dictate when he will take his vacation than a student in college or a boy in school. The Public Printer must determine the times and seasons and periods of absences as the needs or exigencies of his department may permit. But at this point his discretion stops and the supervision of the accounting officers begins. He has ju-

jurisdiction of attendance and work, to grant leaves of absence or to refuse them, but not to increase wages or vary or augment the legal liabilities of the Government. Whether he grant leaves of absence by the month or the week, or for a single day, or for a designated number of days, or not at all, will not affect the wages of the employees; wages are not within the scope of his discretion and will continue precisely the same as if no leave of absence had been granted or refused. This subject of the leave-of-absence laws is not wages, but work; they authorize the Public Printer to lessen work; they do not authorize him to augment pay. (Italics supplied.)

The section herein involved provides that the employee shall be allowed leave to the extent of "*not exceeding 30 days.*" It therefore becomes obvious that even if 30 days' leave be "earned", it is discretionary with the Public Printer as to whether it or a portion thereof should be granted. See comment of Court of Claims on page 10 of *Barringer v. U.S.*, 37 Ct. Cl. 1, reversed on other grounds, 188 U.S. 577; *Taylor v. U.S.*, 39 Ct. Cl. 43. In the latter case, the Court of Claims stated on pages 53 and 54, as follows:

If the Congress by the act of 1895 had intended to authorize the Public Printer to allow leaves of absence with pay for thirty days, no more and no less, it is difficult to understand why the words "to the extent of

not exceeding thirty days" were used. We think the obvious meaning of that language, in its setting in the act, is that the Public Printer is authorized to exercise his discretion in granting leaves of absence, both as to the extent thereof (not exceeding thirty days) and when, depending upon the needs and exigencies of the service intrusted to his charge.

At this place, inasmuch as discretion under this statute has been mentioned here, it should be stated that the appellee makes no such contention as the appellant endeavors to answer in point numbered IV of his brief, pages 15 to 17 thereof.

The effort is made by the appellant to compare "earned" leave with earned pay. It may be conceded that when pay is earned there is a concurrent liability on the part of the Government, but it is submitted that, when the leave privilege to Government employees is analyzed, it will be seen that it is not on the same plane with pay.

The law seems established that this appellant has no vested or property right in his position, and that there is no contract of employment existing between him and the United States.

Butler v. Pennsylvania, 10 How. 402.

Crenshaw v. U.S., 134 U.S. 99.

Taylor and Marshall v. Beckham, 178 U.S. 548.

Weeks v. U.S. ex. rel. Creary, 51 App. D.C. 195.

Having no vested right in his position, it must necessarily follow that the appellant can have no vested rights in incidents thereof, such as leave. Leave is not "earned" like pay. From the very nature of the statute in question, it is clear that, when Congress used the expression "earned", it meant that the privilege of leave could merely *accrue* for the benefit of the employee. The leave is not grantable absolutely, as is pay; and it may be lost if not taken within certain restricted periods. Moreover, it must be requested; that is, it is not granted in the same routine and mechanical manner that pay is given. It may be applied for only under certain conditions, and it may be lost. The attributes of leave indicate very strongly that it is nothing but a privilege, as distinguished from a right which one may have to pay that has been earned.

As the Public Printer, who is the official superior of the appellant in that particular branch of the Government, has the right to exercise a discretion and refuse to allow an employee to receive leave because, for instance, the exigencies of Government require his full staff of employees to remain on duty, thus depriving an employee of leave which he has "earned", then does it not follow logically and reasonably therefrom that the Congress of the United States, which is in fact and in law the mouthpiece of the employer itself, can by legislation reduce the right to enjoy "earned" leave to

15 days within any one year? Congress, having prescribed the leave in the first instance, certainly has the right to curtail it or take it away entirely should it desire to do so. The principle that the power of appointment carries with it the power of removal is, we submit, comparable with the instant situation.

Appellant's whole contention in this case is based upon the false premise that leave with pay is a property right. He overlooks the necessity for the leave to be actually *granted* by the head of the department. The pro rata payment features of the Government Printing Office leave statute are not applicable here, and should not be used to test out the extent of appellant's leave privilege, which is governed by the first sentence of Section 45 of Title 44, U.S.C., *supra*. A regular employee of the Government Printing Office continuing in the service, such as this appellant, receives no commutation in pay for leave which he has accrued but is unable to take; that is to say, for instance, if such an employee were not able, for personal or official reasons, to take all of his leave within the period during which he was required to take it, he would simply lose his leave and would receive nothing in wages, in addition to his regular salary, in lieu thereof. As was said in *Harrison v. United States*, *supra*:

This subject of the leave-of-absence laws is not wages, but work; they authorize the

Public Printer to lessen work; they do not authorize him to augment pay.

We believe that the appellant has inaccurately analyzed the opinion of the Supreme Court in *United States v. Barringer*, 188 U.S. 577, on page 5 of his brief. In any event, even his own statement of the case discloses that the law afforded no commutation in pay for leave that was lost, but that *special* Congressional action was required to reimburse Government Printing Office employees in that connection.

V

Only 15 days cumulative

44 U.S.C., Section 45, *supra*, also provides that leave of absence shall not be allowed to accumulate from year to year. The effect of that provision, and of the regulations which were promulgated pursuant to that section, was that when a Government Printing Office employee "earned" leave in one fiscal year, he had to take all of it in the next fiscal year, or otherwise it was lost. See *Harrison v. United States*, *supra*.

It should be recalled at this point that Section 215 permits the unused part of 15 days' annual leave in any one year to accumulate for any succeeding year.

Thus it will be readily noted that, under the Government Printing Office leave statute, annual leave is not cumulative, but that Section 215 makes such

leave cumulative to the extent of 15 days or less. Assuming, *arguendo*, that Section 215 is not valid insofar as it deprives the appellant of the right to enjoy leave that he has already "earned", it certainly must be conceded that, but for Section 215, his leave would not be cumulative.

It will be remembered that some time between April 1, 1933, and the end of that fiscal year, June 30, 1933, the petitioner applied for and was granted 14 $\frac{1}{4}$ days' leave. Accepting for the moment the contention of the appellant that he still had 14 $\frac{1}{4}$ days coming to him under 44 U.S.C. 45, that leave would be lost unless it was applied for and received before June 30, 1933. It is admitted that the appellant did not ask for the remaining 14 $\frac{1}{4}$ days until September 11, 1933, which, of course, was well into the 1934 fiscal year. The result is that by permitting the 1933 fiscal year to expire, the appellant lost all of his so-called "earned" leave, except such part thereof as may have been made cumulative by Section 215. This latter section simply made the unused part of 15 days' annual leave cumulative, and 14 $\frac{1}{4}$ days thereof having been taken prior to the expiration of the 1933 fiscal year, only $\frac{3}{4}$ of a day, and not 14 $\frac{1}{4}$ days, was left to accumulate. Therefore, for this reason alone, if for none other, the appellant was not entitled to receive, and the appellee was not authorized to grant, the leave which the appellant sought on September 11, 1933.

This lapse of time, we submit, made this entire proceeding useless, and consequently, the case, including this appeal, involves merely a moot question. If the appellee is correct about this, as he believes he is, this appeal should be dismissed.

U.S. ex rel. Gannon v. Georgetown College, 28 App.D.C. 87.

Railway v. Jardine, 56 App.D.C. 33.

Whaley v. Normont, 56 App.D.C. 18.

Savage v. White, 56 App.D.C. 365.

VI

Mandamus does not lie

(a) Rights of the United States of America to the appellant's services and in connection with a financial saving to it in the reduction of appellant's annual leave with pay would be seriously and injuriously affected, but it is not a party to this proceeding, although indispensable thereto. Therefore, mandamus will not lie, as rights of a party, not a defendant to this suit, are involved. *Duncan Townsite Co. v. Lane*, 245 U.S. 308; *U.S. ex rel. Goldberg v. Daniels*, 231 U.S. 218; *United States v. Edwards*, 5 Wall. 563.

(b) It is also a rule of long standing that, as mandamus is an extraordinary remedial process, it is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It will not issue to direct an act which will work a public mischief. *U.S. ex rel. Stowell v. Deming*, 57 App.D.C. 223. In the exercise of this discretion, the

issuance of a writ herein should be declined, for the granting thereof would interfere with the right of the Federal Government to the services of its employees.

(c) The law is well settled that, where a petitioner has another adequate remedy, mandamus will not issue.

LeCrone v. McAdoo, 48 App.D.C. 181.

U.S. ex rel. Carroll Electric Co. v. McCarl, 56 App.D.C. 49.

U.S. ex rel. Finley v. Hines, 58 App.D.C. 120.

Appellant has, and had, another adequate remedy, whether or not he, in fact and in law, has contractual rights which are being violated. He may take his leave without pay and then sue for the 14¼ days' pay. That is all he is claiming here. If he is entitled to leave of absence *with pay*, the procedure suggested provides equivalent relief.

(d) The law of mandamus is also well settled upon the point that where the granting of a writ would be a futile and fruitless act, the court will withhold it. See High, Extraordinary Legal Remedies, page 15; and *U.S. ex rel. Greathouse v. Dern*, 289 U.S. 352, 354.

The answer of the appellee sets out the opinion of the Comptroller General of the United States in the nature of a preaudit. This officer is not a party to this suit. This court may take judicial notice of the power of the Comptroller General to

refuse to approve pay vouchers even though the head of a department may sanction the same.

The result, therefore, might very well be that, if this court should require the appellee to grant the leave in question, and he did so, the Comptroller General might not permit the appellant to be paid.

VII

The act is not unconstitutional

The appellant contends that the act is unconstitutional for the following reasons:

1. It takes his property without due process of law.
2. It denies him equal protection of the law, and thus is discriminatory.

We reply that it does not violate the "due process" clause because there is no property right involved (authorities, *supra*); nor does it impair the obligation of a contract, for, as hereinbefore outlined, no contract exists between the Government and its employees. Appellant's point numbered III is wholly unnecessary, for the appellee makes no such contention in this case as the one therein indicated.

The appellant states no facts in his petition as to why he has been denied the equal protection of the law, or as to why the provisions involved are discriminatory. What he urges in his brief upon this point (pages 12-13) fails to show that any other Government Printing Office employee fared

any better as to his leave. In any event, certainly the constitutional provision in this connection does not apply to the Federal Government in respect of its dealings with its own employees.

CONCLUSION

For the reasons hereinbefore set out, it is respectfully submitted that the judgment of the court below is correct and should be affirmed.

Respectfully submitted.

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